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No. 87-525

In the Supreme Court of the United States**OCTOBER TERM, 1987**

JOSEPH A. BARNES, ET AL., PETITIONERS**v.****DONALD P. HODEL, SECRETARY OF THE UNITED STATES
DEPARTMENT OF THE INTERIOR, ET AL.**

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR RESPONDENTS IN OPPOSITION

CHARLES FRIED*Solicitor General***ROGER J. MARZULLA***Acting Assistant Attorney General***DIRK D. SNEL****WILLIAM B. LAZARUS***Attorneys**Department of Justice**Washington, D.C. 20530**(202) 633-2217*



QUESTION PRESENTED

Whether the Bureau of Land Management properly reserved timber rights to the United States in a mineral patent issued to petitioners.



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BEST

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 819 F.2d 250. The order of the district court (Pet. App. A14-A16) adopting the Magistrate's findings and recommendation (Pet. App. A17-A43) is unreported. The decision of the Interior Board of Land Appeals (Pet. App. A44-A71) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1987. The petition for a writ of certiorari was filed on September 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, who were issued a mineral patent in 1983 (Pet. App. A46) based on claims located in the 1930s, con-

test the reservation to the United States of timber rights on the land encompassed by the patent.

In 1866 and 1870, Congress provided for land grants to the Oregon and California Railroad Company. Act of July 25, 1866, ch. 242, § 2, 14 Stat. 239-240; Act of May 4, 1870, ch. 69, § 1, 16 Stat. 94. The laws provided that segments of land, known as "O & C lands," were to be conveyed to the railroad as construction advanced. They also provided that mineral lands were not to be granted to the railroad. Pet. App. A22-A23. All of the land at issue is in "Section 19," an area in Douglas County, Oregon, and was conveyed to the railroad in 1895 (*id.* at A33). The railroad failed to comply with the conditions of the laws providing for the land grants (see *Oregon & Cal. R.R. v. United States*, 238 U.S. 393 (1915)), and in 1916 Congress declared that the title to certain of the O & C lands reverted in the United States. Act of June 9, 1916, ch. 137, § 1, 39 Stat. 218-219.

Congress three times legislated with respect to the use of the reverted O & C lands. The 1916 Act provided for mineral entries on the reverted land but "contained a general reservation of the title to timber" to the United States (Pet. App. A24). In 1937, Congress restricted the use of the O & C lands containing timber, such as Section 19, to forestry use, thus prohibiting the location of mining claims there. Act of Aug. 28, 1937, ch. 876, § 1, 50 Stat. 874. Eleven years later, in 1948, Congress provided that "notwithstanding any provisions of the Act of August 28, 1937 (50 Stat. 874), or any other Act relating to the * * * Oregon and California Railroad," all of the reverted O & C lands were open to mineral claims. It further validated mineral claims made since the 1937 Act, providing, however, that mineral claimants "shall not acquire title, possessory or otherwise, to the timber, now or hereafter growing thereon." Act of Apr. 8, 1948, ch. 179, 62 Stat. 162. Thus, Congress at all times reserved to the United

States title to the timber on the revested O & C lands. Accordingly, although a valid mining claim normally encompasses the resources on the surface (*Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.*, 171 U.S. 55 (1898)), any mineral patent issued on O & C lands pursuant to the Acts of 1916 or 1948 did not convey the timber on the land.

In 1955, Congress enacted a general law providing for the multiple use of public lands. Act of July 23, 1955, ch. 375, 69 Stat. 367 (the Act). Section 4 of that Act, 30 U.S.C. 612, provides that, with respect to any mining claim "hereafter located" on public lands, timber rights are reserved to the United States. Section 5 of the Act, 30 U.S.C. 613, provided a procedure for determining whether a valid mineral claim had been located before the 1955 Act took effect. Petitioners and their predecessors in interest filed a statement alleging that they had located claims on the lands at issue prior to 1955, and the Bureau of Land Management accepted that statement in 1966 (Pet. App. A72-A74).

The Bureau of Land Management issued a mineral patent to petitioners in 1983 for five lots in Section 19 totaling about 115 acres, reserving the timber to the United States. The parties agreed that the claims for four of the lots were located in the 1930s, prior to the effective date of the 1937 Act (Pet. App. A40), and thus subject to the 1916 Act. The district court found that the fifth lot was located in 1938 and thus subject to the 1948 Act (*id.* at A41). Petitioners challenged the reservation of timber rights, but the Interior Board of Land Appeals affirmed the Bureau of Land Management's denial of their protest (*id.* at A44-A71). Petitioners sought review of that decision. A magistrate recommended that the district court grant summary judgment to the federal defendants (*id.* at A17-A43), and the district court adopted the magistrate's findings

and recommendation (*id.* at A14-A16). The court of appeals affirmed (*id.* at A1-A12).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Accordingly, further review is not warranted.

Petitioners first contend (Pet. 8-12) that Section 19 is not part of the O & C lands that revested in the United States pursuant to the 1916 Act, and, therefore, there is no basis for the reservation of timber rights. A district court determined which lands revested pursuant to the 1916 Act in the 1920s (*United States v. Oregon & Cal. R. R.*, 8 F.2d 645 (D. Or. 1925)), ruling that nearly two million acres of the O & C lands did not revest in the United States because they were mineral lands that were never conveyed to the railroad under the Acts of 1866 and 1870. Petitioners contended below that Section 19 was included in the acreage that did not revest, although it is undisputed that Section 19 was conveyed to the railroad in 1895 (Pet. App. A33), because prior to 1895 five mineral claims were located there. The Interior Board of Land Appeals (Pet. App. A57-A61), the district court (*id.* at A33-A40), and the court of appeals (*id.* at A7) all rejected petitioners' contention. As the district court explained: "The fact that a mining claim may have been filed in section 19 by other persons prior to the issuance of a patent to the railroad does not establish that the land was mineral in character. Many mining claims are filed that are subsequently declared invalid" (*id.* at A34). Moreover, as the district court concluded, "section 19 was specifically identified in the court's decree" entered in 1926 in the proceeding to determine which O & C lands revested in the United States as land that had revested (*id.* at A36, A39-A40). Petitioners do not dispute that the 1926 decree identified Section 19 as

revested land. Accordingly, as the court of appeals concluded, their claim that it did not reconstitute fails "for want of proof" (*id.* at A7).

Petitioners next contend (Pet. 12-17) that the 1966 proceeding before the Bureau of Land Management conclusively established their right to the timber on the land encompassed by their claims. That contention was also correctly rejected by the Interior Board of Land Appeals (Pet. App. A62-A68), the district court (*id.* at A26-A33), and the court of appeals (*id.* at A8-A10). The 1966 proceeding, conducted pursuant to Section 5 of the 1955 Act, determined that petitioners and their predecessors in interest had located mineral claims prior to the effective date of the 1955 Act, so that they were not barred by that Act from taking title to the timber on the land. But, as the district court explained, the 1966 proceeding "did not give [petitioners] any rights but merely recognized that the 1955 Act did not deprive [them] of any right they had theretofore possessed" (Pet. App. A32). Section 7 of the 1955 Act, 30 U.S.C. 615, provides that "nothing in this Act shall be construed * * * to limit or repeal any existing authority to include any reservation, limitation or restriction in any [mineral] patent * * * which is otherwise authorized by law." The 1916 and 1948 Acts relating to the O & C lands are such authority mandating the reservation of the timber on reconstituted lands to the United States. Accordingly, under Section 7, the reservations required by those Acts were not affected by the 1955 Act.

Finally, the court of appeals correctly rejected (Pet. App. A10-A11) petitioners' contention (Pet. 17-24) that there is no authority for the reservation of timber rights on those of its claims located prior to 1937 because the 1937 Act repealed the 1916 Act. The 1937 Act provided that "notwithstanding any provision[] in the Act[] of June 9, 1916, * * * such portions of the reconstituted Oregon and California Railroad * * * grant lands * * * which have

heretofore or may hereafter be classified as timberlands, and power-site lands valuable for timber, shall be managed * * * for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the princip[le] of sustained yield for the purpose of providing a permanent source of timber supply" (§ 1, 50 Stat. 874). As petitioners note (Pet. 19-20), the Department of the Interior concluded that the 1937 Act repealed that portion of the 1916 Act authorizing mining on O & C timberland because it was contrary to the 1937 Act. But, as the court of appeals concluded (Pet. App. A11), nothing in the 1937 Act indicated that Congress intended "to recognize timber rights attached to mining claims located after 1916." Accordingly, the provision of the 1916 Act reserving timber rights to the United States was not in conflict with any provision of the 1937 Act, and hence was not repealed by it.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED

Solicitor General

ROGER J. MARZULLA

Acting Assistant Attorney General

DIRK D. SNEL

WILLIAM B. LAZARUS

Attorneys

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